



# Beating a Dead Horse: Are Damage Caps and Remittitur Redundant?

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Non-economic damage caps and remittitur are both mechanisms to reduce the amount of money a plaintiff can recover following a jury verdict. They have different origins and applications but share many commonalities. The non-economic damage caps and remittitur have the same purpose and are equally undefeated on appeal. They are conducted outside the presence of the jury and thus the public is largely unaware of their existence and application. Finally, remittitur is broader than the caps. Remittitur could replace the caps under all circumstances and is potentially a more just outcome given that a judge is making a case-specific decision after listening to the witnesses and reviewing all the evidence.

## Where Damage Caps & Remittitur Overlap

### Origination & Purpose

In 1986, the Maryland legislature enacted the non-economic damages cap in response to healthcare providers and insurers arguing that high jury awards for non-economic damages were leading to skyrocketing premiums for medical professionals. Initially, the cap was set at \$350,000 and later adjusted for inflation increasing \$15,000 each year. In 2024, the non-economic cap for non-medical malpractice damages that did not result in a death with one or more beneficiaries was \$950,000. Economic damages including past and future medical expenses and past and future lost wages are not subject to the statutory caps.

A Georgetown Law and Economic Research article from 2012 offered a systemic review of whether damage caps affect medical malpractice premiums.<sup>i</sup> The article offers an in-depth analysis of 16 empirical studies examining the wide methodological variations in the studies that employ regression analysis to estimate the impacts of caps on medical malpractice insurance premiums. Advocates for damage caps claim benefits

include lower premiums, adequate physician supply, and lower health care costs.

However, evidence suggests that caps come with costs such as disproportionate effects on vulnerable and disadvantaged populations.<sup>i</sup> The caps also have potential impact on the provider treatment choices and their decisions over how much effort to expend to develop a medical expertise thus increasing injury rates under some circumstances and causing increases in claim rates, total payouts by medical malpractice insurers, and malpractice insurance prices. Advocates for caps tout simple empirical models that suggest reforms such as statutory caps reduce premiums; however, the authors found that studies using more elaborate models which account for changes in physician behavior show damage caps more likely increase or have no impact on premiums.

Remittitur is a common law mechanism without a dedicated statute where a trial judge has discretion to reduce the portion of the verdict which the court deems excessive.<sup>ii</sup> The sole reference to remittitur in Maryland Code lies in Courts and Judicial Proceedings, § 12-301, Appeal of final judgments, “a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law...In a civil case, a plaintiff who has accepted a remittitur may cross-appeal from the final judgment.”

The practice of remittitur is hundreds of years old with an early reference coming from Justice Story while sitting as a Circuit Court judge in Massachusetts in 1822 before eventually ascending to the Supreme Court of the United States stating “[i]t is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages in excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.”<sup>iii</sup>

## Unlikelihood of Overturning

Damages caps and remittitur are both undefeated in the appellate courts of Maryland. The damage caps have withstood all challenges including constitutional challenges with the Maryland appellate courts finding that the caps apply to all actions for personal injury and wrongful death.<sup>iv</sup> The courts have repeatedly held that non-economic caps can only be overturned by legislative action.

Likewise, a trial judge's exercise of remittitur has been equally undisturbed by the Maryland appellate courts. The standard to overturn a grant of remittitur is abuse of discretion and every appeal has found that the trial judge properly exercised their discretion due to their presence in the courtroom judging the relative credibility of the witnesses and weighing the damages testimony.<sup>v</sup>

## Role of the Jury

Damage caps and remittitur are both applied outside the presence of the jury after they have rendered their verdict and left the courtroom. The jury may sit for days or weeks, arranging for childcare and work coverage, carefully listening to evidence, having heated debates during deliberations, and ultimately rendering a verdict they truly believe to be just and fair, only to have it reduced or completely wiped out by the trial court.

Tell any non-lawyer about the non-economic damage caps or remittitur and watch their reaction. They may recall the time they served jury duty. The judge told them how important their service was to our community but later they could have reduced or eliminated their verdict once they left the courtroom. Most people are shocked or angered to know their sacrifice could have been ultimately meaningless. They may have some basic knowledge that caps exist but likely they are unaware of the specifics and almost certainly were not aware that the judge can take away the entire verdict simply because they disagreed with the amount.

Ultimately, eliminating non-economic damages caps via legislative action does not change the public's perception or misperception of the certainty of their verdicts. If anything, repealing the caps presents an opportunity to explain to the public that the legislature is shifting power to the local level and empowering the courts to make the decision on a case-by-case basis rather than culling benefits from deserving victims.

## Where Damage Caps & Remittitur Differ

### Predictability

The non-economic damages cap provides a hard ceiling on all non-economic awards depending on 1) the date of injury, 2) whether the cause of action is based in medical malpractice

or other negligence causes and 3) the number of beneficiaries. The applicable ceiling is applied in all personal injury cases regardless of the facts of the case. They provide certainty where parties know their best- and worst-case scenarios before going to trial and serve to manage the parties' expectations due to the defined range of outcomes.

Unlike damage caps, whether a trial judge grants remittitur and the amount the judge reduces the verdict is often unpredictable absent prior knowledge of your jurist's propensities. The judge must first decide whether to grant remittitur and then what amount to reduce the verdict. The standard is that the trial judge must "determine whether the verdict is grossly excessive, shocks the conscience the court, is inordinate, or excessive."<sup>vi</sup> The court can reduce the verdict as much or as little as it determines appropriate including ordering an entirely new trial. One judge may deem a verdict excessive while another judge may think the same verdict was appropriate and supported by the evidence.

## Role of the Judge

Trial judges likely prefer damage caps to remittitur. The caps remove any decision making from the process. The judge simply applies the cap and records the judgment once the jury has left the courtroom. The lawyers do not make emotional arguments advocating for their client's catastrophic injuries. Most likely, the lawyers have already advised their clients of the cap's certainty and managed their expectations on the outcome before starting the trial.

On the other hand, remittitur is far more personal for the trial judge, the lawyers, and the parties. Remittitur requires a lengthy motions practice, a hearing on the record, and ultimately a ruling from the trial judge. The judge must insert themselves into the process. The reduction is inherently subjective. The judge must decide if the verdict was shocking to them and later explain their decision to the parties who are deeply invested in the outcome. Granting remittitur may lead to another trial in a year taking up additional court time and resources. Denying remittitur may lead to an appeal. While the appellate courts have universally backed the trial judge's decisions on remittitur, the judge still has the lingering potential outcome of being overturned and whatever embarrassment coincides.

Assuming the damage caps are repealed, another consideration is whether the trial courts would then need to decide additional motions for remittitur. What would be the additional burden on the court system? To weigh this effect, we should consider the number of jury verdicts in the State of Maryland during a given year that exceed the non-economic damages cap. There is no central source for this information that tracks all verdicts across 23 counties. Anecdotally, there cannot be more than a dozen or so cases a year concentrated in the busier jurisdictions.

## Post-Reduction Remedies

Damage caps and remittitur differ in post-reduction remedies available to the plaintiff. The damage cap application is final and cannot be changed absent legislative action. However, remittitur offers the plaintiff a remedy to the court's reduction of the verdict – try the case again. Prove to the court that the jury's decision was not grossly excessive, shocking, or merely catching lightning in a bottle. As discussed, the trial court is not going to get overturned on appeal, but a plaintiff can overturn the trial court via a second verdict.

## Remittitur Is Broader Than the Caps

The non-economic damage cap is exercised when the non-economic damages portion of the jury verdict exceeds the statutory cap for that given year. Of course, the damage cap is not applied to economic damages including past and future medical expenses and lost wages or when the verdict is below the statutory ceiling.

Remittitur can be applied in any case for any category of damages for any amount of money the trial court feels is excessive. The most common exercise is non-economic damages but nothing in the common law limits remittitur to non-economic damages. The court could conclude the life-care plan was excessive or the future loss of earning capacity amount was shocking.

## Conclusion

The non-economic damage caps and remittitur share the same purpose of limiting excessive jury verdicts, are equally undisturbed on appeal, and are generally conducted outside the common knowledge of the public.

Caps and remittitur differ in their predictability, the role of the judge, and post-reduction remedies. However, the additional post-verdict motions and the possibility of a second trial are a small cost compared to the benefits of shifting the decision making from a broad and general rule to the local level where a judge is in the best position to determine if the verdict was just or should be reduced. Remittitur also offers a more democratic solution where a plaintiff could try their case a second time and ask another group of citizens to judge the case. If two separate juries decide the case the same way, it is difficult to deny the will of the people.

Finally, remittitur is broader than the non-economic damage caps. The damage caps are only applied when non-economics exceed the statutory ceiling. Remittitur can be applied to any category of compensatory damages or punitive damages in any personal injury case. Why do we need a hat when we already have an umbrella?

## Biographies

**John Everett** is a trial lawyer at *ChasenBoscolo Injury Lawyers* who tries cases all over Maryland, the District of Columbia, and the Commonwealth of Virginia. He has obtained many million-dollar verdicts for his clients and was named the Maryland Association of Justice's Trial Attorney of the Year in 2019. After graduating from Boston College, John received his Juris Doctor from the University of Maryland Francis King Carey School of Law. A Baltimore native, John enjoys spending time with his wife and four daughters.

**Katie Beale** is a trial lawyer at *ChasenBoscolo Injury Lawyers*. She enjoys fighting for the underdogs and empowering clients in the courtroom. Katie obtained her Juris Doctor from Syracuse University College of Law, and is admitted to practice law in New York, the District of Columbia, Maryland, and Virginia. Katie currently lives in Northern Virginia with her husband and son.

<sup>1</sup> Zeiler, Kathryn & Hardcastle, Lorian Hardcastle, Do Damages Caps Reduce Medical Malpractice Insurance Premiums?: A Systematic Review of Estimates and the Methods Used to Produce Them, No. 12-042 Georgetown Law and Economics Research Paper Series (2012).

<sup>2</sup> Hebron v. Volunteer Fire Dept., Inc. v. Whitelock, 166 Md.App. 619 (2006); CSX Transp., Inc. v. Pitts, 203 Md. App. 343 (2012); Bangura v. Taylor, 312 Md. 609, 624 (1988).

<sup>3</sup> Blunt v. Little, 3 Mason 102, 3 F.Cas 760 (1822).

<sup>4</sup> Simms v. Holiday Inns, Inc., 746 F. Supp 596 (1990); Green v. N.B.S., 180 Md.App. 639 (2008).

<sup>5</sup> Bangura v. Taylor, 312 Md. 609, 624 (1988); Hebron Volunteer Fire Dept. v. Whitelock, 166 Md.App. 619 (2006); Blitzer v. Breski, 259 Md.App. 257 (2023).

<sup>6</sup> Exxon Mobil Corp. v. Albright, 433 Md. 303, 414 (2013).

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